

Comments of Intellectual Property Constituency April 4, 2011

The Intellectual Property Constituency appreciates the opportunity to comment on the Proposed Framework for the Fiscal Year 2012 (FY12) Operating Plan and Budget (Framework). See <http://www.icann.org/en/planning/ops-budget-framework-fy2012-en.pdf>.

Last year's budget development and approval process was contentious and frustrating, not only for IPC, but also for several other groups representing non-contracted parties participating in the Generic Names Supporting Organization. The ICANN staff succeeded in stimulating a consensus across the Non-Contracted Parties House that the budget was inequitable and appeared to cater excessively to the interests and needs of contracted parties. The issue was raised repeatedly in the public forum at the ICANN Brussels meeting in June 2010, which ended with a clear ICANN commitment to greater transparency and opportunity for community input in the budget cycle for FY12.

The Framework document represents a failure to meet that commitment. A year ago, the ICANN community had the opportunity to review and comment on a 39-page document that included numerous charts and prose discussions of ICANN's budget and operating priorities, and how it proposed to spend more than \$60 million that would be provided to it in the year ahead, almost entirely by registrants in the generic Top Level Domains. See <http://www.icann.org/en/planning/ops-budget-framework-fy2011-en.pdf>. This document provided considerable detail: for instance, it specified how much ICANN proposed to spend on contract compliance activities, and presented a full page of discussion of this topic that listed ten "key activities" that ICANN planned to undertake. IPC and other commenters provided detailed reactions and comments on this framework document, not only on contract compliance but also on other topics.

This year, the community has been presented as a framework document with 24 slides that provide only a very high-level view of ICANN's priorities. The document mentions contract compliance exactly once, and only for the purpose of listing it (on slide 13) as one of the 13 activities that fall within the budget for "core operations." It is impossible for anyone to learn from this document how much ICANN plans to spend on contract compliance, what will be its priorities, and to what deliverables it will commit itself during the upcoming fiscal year. Accordingly it is virtually impossible to provide meaningful comments on the glittering generalities that predominate in this document. This is the opposite of transparency. It is obfuscation.

As IPC observed in its comments on the budget framework in April, 2009: "The entire ICANN experiment depends on using contractual agreements as a substitute for government regulation. The viability of that experiment remains in question so long as those agreements are not consistently and predictably enforced." <http://forum.icann.org/lists/op-budget-fy2010/pdf4fj6V4c2H5.pdf>. It hardly needs to be stated that the contract compliance challenge will become even more massive with the rollout of many new gTLDs, perhaps beginning as soon as FY12. It is disappointing and frustrating that the budget and operating plan framework document presented to the community provides absolutely no information about how ICANN plans to meet that challenge and how much it will spend to do so.

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Contract compliance is only one example. To give another: A year ago, IPC commented with regard to the FY 2011 framework document that “ICANN should budget for higher policy development costs.” <http://forum.icann.org/lists/op-budget-fy2011/pdfO5pzDftPgV.pdf>. We know from slide 13 of this year’s framework document that policy development falls under “core operations.” We know from slide 12 that ICANN plans to spend \$51.9 million on “core operations,” in five functional categories (personnel, travel & meetings, etc.). But the framework does not tell us how much will be spent on policy development, and whether that amount is more or less than what was spent in FY11. Thus we don’t know whether our 2010 comment fell on deaf ears, or whether we need to make the same comment again this year. Here again, zero transparency has been achieved.

We anticipate the response from staff that more detail will be provided when the full operating plan and budget is posted for public comment 45 days prior to the by-laws deadline for budget adoption. Our decade of experience in commenting on ICANN budget matters makes it crystal clear to us that by then, it will be too late to advocate for meaningful changes in the budget. Having obfuscated the details until mid-May, the staff will undoubtedly argue that it is impossible to do more than tinker with the details once they are presented.

We appreciate that ICANN has, for the first time, provided a formal process for constituencies and other ICANN entities to make budget proposals for support of their own activities. This is welcomed, and IPC submitted four such budget proposals, which are listed in the document for “Summary of Additional Requests.” But this is beside the larger point, which is that IPC is this year being denied any meaningful opportunity to provide its views on any specific aspects of how ICANN proposes to spend gTLD registrants’ money on activities intended to benefit the entire community – of which contract compliance activities is an excellent example.

With these limitations in mind, we have the following questions regarding the bird’s eye view of ICANN’s operating plans and budget that is provided in the framework document:

1. Slide 10: ICANN’s budget figure for revenue this year from ccTLDs (\$1.6 million) is almost double the amount actually expected to be collected by June 30, 2011 (\$835,000). Yet the same budget figure is given for FY12. Why was ICANN’s budget so far off from reality this year? Was it due to one-time aberrations, or to more persistent features of the ccTLD environment? Is the FY12 budget figure grounded in reality, or is it wishful thinking about what ccTLDs should contribute?

2 Slide 11: The two fastest-growing expenditure categories listed are Travel & Meetings (36% growth from FY11 budget) and Professional Services (15%). \$3.6 million of the \$4 million growth for Travel & Meetings is due to FY12 Projects, according to Slide 12. How is this sum allocated among the 9 projects listed on Slide 14? Is the lion’s share going to the “Global DNS SSR Symposium,” which is the only project listed that seems to consist solely of a Meeting to which people might be paid to Travel? For Professional Services, the \$6.8 million allocated to projects far exceeds the \$2.3 million growth called for in this category. Which of the 9 projects necessitate this large allocation? Which Professional Services will be trimmed from the core operations functions to accommodate this huge growth in Professional Services for

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projects? How much of the hit will be taken, for example, by Professional Services used to support contract compliance? Or policy development?

3. Slide 16: The new gTLD application program, assuming it launches in FY 12, will bring in \$92.5 million in revenue (slide 9). However, only \$36 million of that will be spent on the launch. An additional \$6.8 million is listed as “New gTLD Project,” which we assume to be money that will be spent even if the new gTLD launch window does not open in FY12. How will these project expenses be covered if the program does not launch next year? Assuming it does launch, expected revenue will exceed expenses by at least \$49.7 million ($92.5M - (36M + 6.8M)$). How is this revenue accounted for in the budget framework? We have been told that roughly one-third of the cost-recovery application fee (@\$185,000) is set aside for a contingency reserve for litigation and similar risks. That will be roughly \$31 million. This still leaves \$18.7 million to be accounted for. As with any risk contingency there is some chance that the actual expenses either will exceed the \$31 million figure or that they will be significantly less than anticipated. How are these chances reflected in the budget framework?

4. Slide 17: As this slide notes, one feature of the new gTLD launch will be auctions to resolve string contention. How does the budget framework account for the funds ICANN would receive as a result of the auction process? How much revenue is anticipated, and how is it proposed to be spent (presumably only a small fraction will be needed to defray the expenses of running the auction)?

Respectfully submitted,

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